

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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BLUE MAGIC PRODUCTS, INC.,  
(BOYD FLOTATION, INC., ALLEGED  
SUCCESSOR OR ASSIGN),

Plaintiff,

v.

NO. CIV. S-00-1155 WBS JFM  
NO. CIV. S-04-2398 WBS JFM

MEMORANDUM AND ORDER  
RE: MOTION FOR ATTORNEYS' FEES  
AND COSTS

BLUE MAGIC, INC., et al., (THE  
RECTORSEAL CORPORATION,  
SUCCESSOR),

Defendant.

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BOYD FLOTATION, INC.,

Plaintiff

v.

THE RECTORSEAL CORPORATION,

Defendant.<sup>1</sup>

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On May 13, 2005 the court issued an order granting the  
Rectorseal Corporation's ("Rectorseal") motion to enforce a

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<sup>1</sup> For purposes of consistency, the court maintains the  
same captioning originally used in the this matter. (See May 13,  
2005 Mem. & Order Re: Motion to Enforce Settlement Agreement and  
Motion For Declaratory Relief).

1 settlement agreement against Boyd Flotation, Inc. ("Boyd  
2 Flotation"). (May 13, 2005 Mem. & Order Re: Motion to Enforce  
3 Settlement Agreement & Mot. for Declaratory Relief ("May 13, 2005  
4 Mem. & Order") at 15). In that same order, the court authorized  
5 "Rectorseal [to] recover its reasonable attorneys' fees,  
6 expenses, and costs incurred in cases No. 00-1155 and 04-2398 by  
7 proper motion pursuant to Local Rules 54-292 and 54-293." (Id.).  
8 Rectorseal now moves to recover \$63,225.06 in attorneys' fees and  
9 \$150.00 in costs as authorized by the court.

10 On June 10, 2005, Rectorseal filed with this court a  
11 "Bill of Costs and Motion for Award of Attorneys' Fees." On June  
12 14, 2005, the clerk deemed the filing a "Motion for Attorneys'  
13 Fees and Costs." (See Clerk's Notice of Correction on June 14,  
14 2005). On June 24, 2005, Boyd Flotation filed objections to  
15 Rectorseal's bill of costs which Boyd Flotation amended the same  
16 day. (See Boyd Flotation's Objections to Rectorseal's Bill of  
17 Costs; Boyd Flotation's Am. Objections to Rectorseal's Bill of  
18 Costs). On July 22, 2005, Boyd Flotation filed an opposition to  
19 Rectorseal's motion for attorneys' fees.

20 A. Bill of Costs

21 Rectorseal submitted its bill of costs totaling \$150 on  
22 June 10, 2005. Boyd Flotation argues that the bill of costs is  
23 untimely. (See Boyd Flotation's Am. Objection to Rectorseal's  
24 Bill of Costs at 1-2). Boyd Flotation is correct.

25 In its May 13, 2005 memorandum and order, the court  
26 ordered that Rectorseal could recover its reasonable costs "by  
27 proper motion pursuant to Local Rule[] 54-292. . . ." (May 13,  
28 2005 Mem. & Order at 15). Local Rule 54-292 states that a party

1 seeking to recover costs must "[w]ithin ten (10) days after entry  
2 of judgment or order under which costs may be claimed . . . file  
3 with the Clerk a bill of costs. . . ." Local Rule 54-  
4 292(emphasis added). The May 13, 2005 memorandum and order  
5 authorized Rectorseal to recover costs. Thus, at first glance,  
6 it would appear that Rectorseal had only until May 23, 2005 (10  
7 days after the order) to file its bill of costs.

8           However, Federal Rule of Civil Procedure 6(a) states  
9 that "[i]n computing any period of time prescribed . . . by the  
10 local rules of any district court . . . the day of the act or  
11 event shall not be included. . . ." Rule 6(a) also states that  
12 "[w]hen the period of time prescribed or allowed is less than 11  
13 days, intermediate Saturdays, Sundays, and legal holidays shall  
14 be excluded in the computation." This means that the court does  
15 not count May 13, 2005, the day of the order, in calculating the  
16 10-day deadline. It also means that all the intermediate  
17 Saturdays and Sundays (May 14-15, 21-22, 2005) are excluded from  
18 the calculation. This would make the deadline May 27, 2005.

19           Further, Rule 6(e) gave Rectorseal an additional three  
20 (3) days to file its bill of costs because the court's order was  
21 issued electronically. Fed. R. Civ. P. 6(e); see also Fed. R.  
22 Civ. P. 5(b)(2)(D). This would further extend the deadline to at  
23 least May 30, 2005, if not to June 2, 2005, should one exclude  
24 the Saturday and Sunday of the 28th and 29th of May 2005 as well  
25 as the Memorial Day holiday falling on May 30, 2005.

26           Either way, Rectorseal did not meet the deadline for  
27 filing its bill of costs, because it failed to file the bill of  
28 costs until June 10, 2005, between eight to eleven (8-11) days

1 too late. Therefore, Rectorseal's bill of costs is denied as  
2 untimely.

3 B. Motion For Attorneys' Fees

4 i. Timeliness

5 Boyd Flotation argues that Rectorseal's motion for  
6 attorneys' fees is also untimely because it was filed after the  
7 deadline established by Federal Rule of Civil Procedure 54(d).  
8 This argument misconstrues the intent of the court's May 13, 2005  
9 memorandum and order.

10 In that memorandum and order, the court ordered that  
11 "Rectorseal [could] recover its reasonable attorneys' fees . . .  
12 incurred in case[] No[s]. 00-115 and 04-2398 by proper motion  
13 pursuant to Local Rule[] . . . 54-293." (May 13, 2005 Mem. &  
14 Order at 15). Local Rule 54-293 allows "[m]otions for awards of  
15 attorneys' fees to prevailing parties pursuant to statute to be  
16 filed not later than thirty (30) days after entry of final  
17 judgment." Because Local Rule 54-293 generally governs only  
18 attorneys' fees motions brought pursuant to statute, Boyd  
19 Flotation argues that Federal Rule of Civil Procedure 54(d)'s  
20 deadline for filing attorneys' fees motions should apply.

21 Rule 54(d) (2) (B) states that "[u]nless otherwise  
22 provided by statute or order of the court, the motion must be  
23 filed no later than 14 days after entry of judgment. . .  
24 ." (emphasis added). Boyd Flotation would have the court  
25 interpret Rule 54(d) to require Rectorseal to file its attorneys'  
26 fees motion within 14 days after entry of judgment. However, the  
27 court specifically extended the 14-day deadline when it  
28 authorized Rectorseal to file its attorneys' fees motion

1 "pursuant to Local Rule 54-293." (May 13, 2005 Mem. & Order at  
2 15). Therefore, the deadline for filing attorneys' fees motions  
3 set by Local Rule 54-293, as opposed to that set by Rule 54(d),  
4 governs this motion.

5 The appropriate deadline for filing Rectorseal's motion  
6 for attorneys' fees was thus 30 days after entry of final  
7 judgment. See Local Rule 54-293. Final judgment has not even  
8 been entered in this case. The deadline has thus not passed.

9 Boyd Flotation argues that the court's May 13, 2005  
10 memorandum and order constituted a final judgment because the  
11 order "invited Rectorseal to file a postjudgment motion for  
12 attorneys' fees." (See Boyd Flotation's Opp'n to Rectorseal's  
13 Mot. for Attnys' Fees at 3 n.2). Even if the court accepted the  
14 argument, Rectorseal's motion for attorneys' fees would still be  
15 timely filed. Rectorseal filed its motion for attorneys' fees on  
16 June 10, 2005, within 30 calendar days of the May 13, 2005  
17 memorandum and order. Therefore, the motion is timely.

18 ii. The Court Need Not Reconsider the Merits of its May 13,  
19 2005 Memorandum and Order to Resolve This Motion

20 In its opposition to Rectorseal's motion for attorneys'  
21 fees, Boyd Flotation devotes approximately four-pages to an ill-  
22 considered attack on the merits of the court's May 13, 2005  
23 memorandum and order. (See Boyd Flotation's Opp'n to  
24 Rectorseal's Mot. For Award of Attnys' Fees at 3-7). This motion  
25 is not the appropriate vehicle for such a challenge.

26 "[A] motion for attorney fees is unlike a motion to  
27 alter or amend a judgment. It does not imply a change in the  
28 judgment, but merely seeks what is due because of the judgment."

1 United States v. Eleven Vehicles, 200 F.3d 203, 208 (3d Cir.  
2 2000) (citation omitted). A motion for attorneys' fees is meant  
3 to determine the reasonableness of the fees sought to be  
4 recovered and ". . . should not result in a second major  
5 litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

6 Rightly or wrongly, this court resolved the issue of  
7 whether Rectorseal was entitled to recover its reasonable  
8 attorneys' fees incurred in cases Nos. 00-1155 and 04-2398 from  
9 Boyd Flotation in its May 13, 2005 memorandum and order. (See  
10 May 13, 2005 Mem. & Order at 15). The court need not revisit the  
11 issue here. Had Boyd Flotation wanted the court to reconsider  
12 the merits of its May 13, 2005 memorandum and order, Boyd  
13 Flotation was free to bring a motion to alter or amend the  
14 judgment pursuant to Federal Rule of Civil Procedure 59. It  
15 could also have brought a motion to reconsider under Federal Rule  
16 of Civil Procedure 60(b). If it is still dissatisfied with the  
17 court's decision after judgment is entered, it can appeal to the  
18 Court of Appeals. However, since this court has already  
19 determined that Rectorseal may recover attorneys' fees from Boyd  
20 Flotation, Boyd Flotation may not transform its opposition to  
21 Rectorseal's motion for attorneys' fees into either a Rule 59 or  
22 Rule 60(b) motion simply by arguing as if it were such a motion.  
23 See Eleven Vehicles, 200 F.3d at 208.

24 iii. Objections to Attorneys' Fees Claimed

25 Aside from attacking the merits of the court's May 13,  
26 2005 memorandum and order, Boyd Flotation makes three main  
27 arguments as to why the court should not award Rectorseal its  
28 requested attorneys' fees. First, Boyd Flotation contends that

1 the court should exercise its discretion to deny Rectorseal any  
2 fees award because such an award would be "inequitable and  
3 unreasonable" considering that Boyd Flotation never consented to  
4 the contractual provision under which the court authorized an  
5 award of fees against Boyd Flotation in the May 13, 2005  
6 memorandum and order.

7           In the Ninth Circuit, [t]he general rule is that a  
8 court 'abuses its discretion if it awards contractually-  
9 authorized attorneys' fees under circumstances that make the  
10 award inequitable or unreasonable or fails to award such fees in  
11 a situation where inequity will not result.'" Andersen v.  
12 Melswani, 179 F.3d 763, 766 (9th Cir. 1999); see also DeBlasio  
13 Constr. Co. v. Mountain States Constr. Co., 588 F.2d 259, 263  
14 (9th Cir. 1978) (noting that "court[s] in [their] discretion could  
15 conclude that allowing attorneys' fees when both parties ha[ve]  
16 acted improperly would be inequitable and unreasonable." ).  
17 However, Boyd Flotation already had an opportunity to argue  
18 against an award of attorneys' fees, and did in fact argue  
19 against the award, when it responded to Rectorseal's earlier  
20 motion to enforce the settlement agreement. After considering  
21 Boyd Flotation's arguments, the court rejected them and  
22 determined that, pursuant to the settlement agreement at issue,  
23 Rectorseal was entitled to recover from Boyd Flotation all  
24 reasonable attorneys' fees Rectorseal incurred in cases No. 00-  
25 1155 and 04-2398. (See May 123, 2005 Mem. & Order at 15). For  
26 reasons, stated in the previous section, this motion is not a  
27 suitable forum to relitigate this issue. Therefore, this  
28 argument is rejected.

1 Second, Boyd Flotation argues that Rectorseal's motion  
2 for attorneys' fees should be denied because Rectorseal fails to  
3 request attorneys' fees incurred in Case No. 00-1155, and fails  
4 to distinguish the fees incurred in Case No. 00-1155 from those  
5 incurred in Case No. 04-2398.

6 The argument centers on the fact that Rectorseal  
7 omitted to include Case No. 00-1155 in the caption of its motion  
8 for attorneys' fees. True enough, the caption to the motion only  
9 lists Case No. 04-2398. (See Rectorseal's Bill of Costs and Mot.  
10 For Award of Attorneys' Fees at 1). However, the motion  
11 specifically references the order line from the court's May 13,  
12 2005 order authorizing Rectorseal to recover "its reasonable  
13 attorneys' fees . . . incurred in Case Nos. 00-1155 and 04-  
14 2398.") (See id. at 2)) (citing May 13, 2005 Mem. & Order at 15).  
15 The motion also moves the court for attorneys' fees in the total  
16 amount of "Sixty-Three Thousand Two Hundred and Twenty-Five  
17 Dollars and Six Cents (\$63,225.06), as set forth in Exhibit 'B'  
18 attached [to the motion]." (Id.). Boyd Flotation concedes in  
19 its opposition to Rectorseal's motion that the fees set forth in  
20 "Exhibit B" to the motion include fees Rectorseal incurred in  
21 working on Case No. 00-1155. (See Boyd Flotation's Opp'n to  
22 Rectorseal's Mot. For Award of Attnys' Fees at 8-10). Under the  
23 circumstances, Boyd Flotation cannot reasonably contend that  
24 Rectorseal's clerical error amounts to a waiver of Rectorseal's  
25 right recover any fees incurred in Case No. 00-1155. Therefore,  
26 this objection is overruled. Cf. In re Equity Funding Corp. Sec.  
27 Litig., 438 F.Supp. 1303, 1340 n.56 (N.D. Cal. 1977) (correcting  
28 clerical error by a party in order to award correct amount of



1 fees).

2 Third, Boyd Flotation challenges the reasonableness of  
3 some of the fees requested by Rectorseal. The settlement  
4 agreement authorizing Rectorseal to recover fees is, by its own  
5 terms, governed by California law. (See May 13, 2005 Mem. &  
6 Order at 5) (citing settlement agreement). Therefore, the  
7 relevant standard to be applied in determining the appropriate  
8 amount of fees recoverable is that established by California law.  
9 See In re Sheldon Baroff v. Baroff, 105 F.3d 439, 441 (9th Cir.  
10 1997) (noting that state law governs claims for attorneys' fees  
11 awards authorized by contract).

12 Under California law, courts determine the amount of an  
13 attorneys' fees award by using the lodestar calculation - the  
14 number of hours reasonably expended on the litigation justifying  
15 the award multiplied by a reasonable hourly rate. Ketchum v.  
16 Moses, 24 Cal. 4th 1122, 1134 (2001). The lodestar figure serves  
17 as a base from which the court may augment or diminish the  
18 attorneys' fee amount in accordance with other relevant factors.  
19 See Weeks v. Baker & McKenzie, 63 Cal. App. 4th 1128, 1173  
20 (1998).<sup>2</sup> However, such an adjustment is discretionary. Ketchum,  
21 24 Cal. 4th at 1138. In general, "[the] amount to be awarded as  
22 attorneys' fees is left to the sound discretion of the trial  
23 court." Glendora Cmty. Redevelopment Agency v. Demeter, 155 Cal.  
24 App. 3d 465, 474 (1984) (citation omitted).

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26 <sup>2</sup> These factors include, among other things, (1) the  
27 nature of the litigation, (2) its difficulty, (3) the amount of  
28 money involved, (4) the skill required in its handling, (5) the  
skill employed, (6) the attention given, (7) the success or  
failure, and (8) whether the fee is fixed or contingent. PLCM  
Group, Inc. v. Drexler, 22 Cal. 4th 1084, 1096 (2000).

1 To determine the reasonableness of hourly rates claimed  
2 under California law, the court looks to the prevailing market  
3 rates in the relevant community for similar work performed by  
4 attorneys of comparable skill, experience, and reputation. PCLM  
5 Group, 22 Cal. 4th at 1095.

6 Rectorseal has submitted affidavits and accompanying  
7 billing statements itemizing the rates its various counsel  
8 charged for time spent on this matter. The rates range from \$125  
9 to \$385 per hour, with the majority of them falling around \$225  
10 per hour. (See Rectorseal's Mot. For Award of Attnys' Fees Ex. B  
11 (Invoices)). Boyd Flotation does not challenge the rates  
12 charged. Nor are these rates exceptionally high for the nature  
13 of the work performed in this matter. Therefore, the court  
14 accepts the rates submitted by Rectorseal.

15 Boyd Flotation does contend that some of the hours  
16 expended by Rectorseal's counsel are unreasonable in that they  
17 are either unrelated to the underlying litigation or are  
18 unsupported by sufficient documentation.

19 Rectorseal's invoice 483208 (dated 11/9/04) includes an  
20 entry for 09/15/04 charging \$112.50 for a "Letter to Gary R.  
21 Farrar with check in the amount of \$18,141.55 constituting final  
22 payment pursuant to the Settlement and Release Agreement." (See  
23 Rectorseal's Mot. For Award of Attnys' Fees Ex. B (Invoice  
24 483208)). Boyd Flotation rightly objects to these fees as having  
25 been incurred in connection with the performance of Rectorseal's  
26 obligations under the settlement agreement, rather than in  
27 connection with the subject litigation. Therefore, the court  
28 will reduce Rectorseal's fee award by \$112.50.

1 Boyd Flotation also objects to three invoices from  
2 Locke Liddell & Sapp, from March 2004 (No. 475082, for \$322.51),  
3 May 2004 (No. 485920, for \$962.50), and August 2004 (No. 501032,  
4 for \$167) on the ground that they have no connection with Case  
5 No. 24398. This general argument has already been addressed and  
6 rejected. Further, Rectorseal's counsel, Kenneth B. Baker,  
7 clarifies in his affidavit that the these fees were charged for  
8 legal research regarding Boyd Flotation's position as to the  
9 enforceability of the settlement agreement at issue in the  
10 underlying litigation. (See id. Ex. B (Baker Affidavit) ¶¶ 7-8).  
11 Therefore, the fees were reasonably incurred, and the court  
12 rejects this argument for reducing Rectorseal's fee award.

13 Finally, Boyd Flotation objects to three vague time  
14 entries on invoice 508095 (12/6/04, 12/7/04, and 12/8/04)  
15 totaling 18.5 hours and \$2,312.50. The entries state only that  
16 time was spent doing "research for memorandum" and "drafting  
17 memorandum." (See id. Ex. B (Invoice 508095)). However, they  
18 directly follow another entry indicating that the two attorneys  
19 who billed the challenged hours had previously met to discuss the  
20 issues that needed to be addressed in the memorandum. (See id.  
21 (12/06/2004 entry)). The context of the entries suggests that  
22 the hours were appropriately expended researching legal issues  
23 pertinent to the litigation.

24 Further, Kenneth Baker makes this clear in his sworn  
25 affidavit wherein he states that he "prepared the . . . Motion  
26 for Award of Attorneys' Fees . . . [and that] the costs set forth  
27 therein . . . are correctly stated, were necessarily incurred  
28 during [the] litigation, and represent fees for services that

1 were actually and necessarily performed." (See id. Ex. B (Fagan  
2 Affidavit) ¶ 4). Under California law, "[t]estimony of an  
3 attorney as to the number of hours worked on a particular case is  
4 sufficient evidence to support an award of attorney fees, even in  
5 the absence of detailed time records." Martino v. Denevi, 182  
6 Cal. App. 3d 553, 558 (1986); see also Demeter, 155 Cal. App. 3d  
7 at 470-471, 478 (accepting counsel's testimony regarding number of  
8 hours expended); Margolin v. Reg. Planning Comm., 134 Cal. App.  
9 3d 999, 1006 (1982) (awarding attorneys' fees unsupported by  
10 records where attorney attested to them under oath). Mr. Fagan's  
11 sworn affidavit, in conjunction with the billing records, is  
12 sufficient to justify an award for these charges. Thus, the  
13 court will deny Boyd Flotation's objection to these fees.

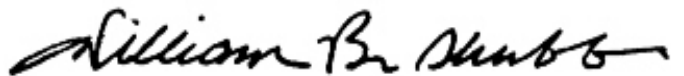
14 Because only one of Boyd Flotation's objections is  
15 meritorious, Rectorseal's attorneys' fees award need only be  
16 reduced by \$112.50. This brings the total amount of the fee  
17 award to \$63,112.56.

18 IT IS THEREFORE ORDERED that:

19 (1) defendant Rectorseal's bill of costs be, and the  
20 same hereby is, DENIED; and

21 (2) defendant Rectorseal's motion for attorneys' fees  
22 be, and the same hereby is, GRANTED in the amount of **\$63,112.56**.

23 DATED: August 11, 2005

24 

25 WILLIAM B. SHUBB  
26 UNITED STATES DISTRICT JUDGE  
27  
28